

Supreme Court, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1410

JOSEPH V. AGOSTO,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

REPLY BRIEF FOR THE PETITIONER

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In attempting to establish that the Board of Immigration Appeals found that petitioner failed to present a colorable claim of United States citizenship (Br. 20, 30), respondent has rewritten the most significant portion of the Board's decision.

**The Board's Decision
(Pet. App. viii)**

"If believed, the testimony of the Pianettis and of Carmen Ripolino *clearly refutes* the Service's otherwise strong documentary demonstration of the [petitioner's] alienage. The immigration judge, however, found the Pianettis not to be credible witnesses * * *

The immigration judge was in the best position to judge the veracity of these witnesses * * *

It is *not beyond the realm of possibility* that the [petitioner's] claim to United States citizenship is legitimate" (emphasis supplied).

This revision—turning the Board's decision deferring to the immigration judge on the critical issue of credibility into a judgment by the Board that the petitioner's evidence was facially incredible—allows respondent to argue that three separate tribunals have concurred in a finding that petitioner has not presented a colorable claim of citizenship, and that this Court should defer to their finding (Br. 20, 30). Further, it allows respondent to avoid meeting the issue of whether or not it was proper for the court of appeals *under the particular circumstances of this case* to extend its examination of the administrative record beyond reading the decision of the Board of

**Respondent's revision
(Br. 16)**

"The Board stated * * * that the testimony of the Pianettis and Carmen Ripolino, if believed, would have *contradicted* the documentary evidence that petitioner was born in Italy. The Board thought, however, that it was *impossible* to credit the testimony. It also concluded that, even if the Pianetti and Ripolino testimony were believed, it still would be clear that petitioner is an alien because their story, *even taken at face value, cannot be correct* * * *" (emphasis supplied).

Immigration Appeals.¹ That decision manifested the Board's view that petitioner's evidence was substantial, and that credibility was the determinative factor in resolving his claim. Hence, the court of appeals' inquiry conducted under 8 U.S.C. 1105a(a)(5) should have come to an end with its examination of the Board's decision wherein the existence of a genuine issue of material fact was clearly revealed.

This is not the usual case involving review by a court of appeals of a decision of an administrative agency to determine if its findings are supported by substantial evidence. In such an instance, the record as a whole must be reviewed. *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474. Here, however, the role of a court of appeals is essentially similar to that of a district court considering a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627. Furthermore, it is axiomatic that a court must view the record in the light most favorable to the party opposing summary judgment.

¹Respondent alludes to this issue by misstating petitioner's position as follows: "[Petitioner] seems to argue, however, that the administrative record should not be considered because the Board of Immigration Appeals did not recite all of it * * *" (Br. 24, fn. 18)

Had the court below followed accepted summary judgment principles the decision of the Board would have told the court all it needed to know—that petitioner's claim could not be resolved as a matter of law inasmuch as his evidence, if believed, was sufficient to support a finding that he was a citizen by birth in the United States. In substituting its judgment for the judgment of the Board on the question of whether a genuine issue of material fact exists, the court below improperly acted as a fact finder, assessing the credibility and the weight of petitioner's evidence. By so doing, it deprived petitioner of his constitutional and statutory right to a trial *de novo* in district court where live testimony could be heard and a complete record could be developed.

Respectfully submitted,

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February 17, 1978.